PUBLIC PROSECUTOR

v.

HAJI SUDIN BIN SUBE

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL REVISION NO. T(43) - 2 OF 1993]
7 DECEMBER 1993

CRIMINAL LAW & PROCEDURE: Charge of voluntarily causing grevious hurt by a dangerous weapon - Penal Code, s. 326 - Directions on proper framing of charges against an accused person - Accused ordered to be sent to Mental Hospital for observation - Criminal Procedure Code, s. 324(iii) - Lower Court Judge resorting to s. 344 of the Criminal Procedure Code after receipt of medical report - Whether Judge acted correctly in so doing - Whether accused was of sound mind and capable of making his defence at the trial.

The accused was brought before the Sessions Court to answer a charge of voluntarily causing grevious hurt by a dangerous weapon under s. 326 of the Penal Code. At the hearing the Sessions Judge made an order pursuant to s. 324(iii) of the Criminal Procedure Code (CPC) for the accused to be sent to a Mental Hospital for at least a month for observation.

The medical report on the accused stated *inter alia* that the accused was suffering from Schizophrenia and was of unsound mind and stated that he was under the influence of mental illness at the time of committing the alleged offence but went on to state further that the accused was fit to plead and attend trial in Court.

The learned Sessions Judge subsequently invoked the provisions of s. 344 of the CPC and committed the accused to a mental hospital pending the order of the Ruler of the State.

The High Court was called upon to exercise its powers of revision and the question that arose was whether the learned Sessions Judge was correct in resorting to s. 344 of the CPC in the circumstances of the case.

Held:

[1] It should be obvious to those involved in the administration of justice that the accused had been charged in one charge with two offences each of which should have been the subject of a separate charge but both of which could have been tried together.

[2] Section 343(i) of the CPC requires a certification that the accused "is of sound mind and capable of making his defence" before the trial can proceed. At this stage of the proceedings the Court was only concerned to establish whether the accused is or is not of sound mind and capable of making his defence which involves deciding whether he is of sufficient intellect to comprehend the course of the trial so as to make a proper defence.

[3] Given the fact that the medical report is equivocal and that the learned Sessions Judge did not state that the report had satisfied him that the accused was of unsound mind and incapable of making his defence, the learned Judge should not have ordered the accused to be committed to the mental hospital for safe custody pending the "order of the Ruler" under the provisions of s. 344 of the CPC.

[4] In the circumstances the accused should be brought before the Sessions Judge to enable him to decide whether the accused is or is not of sound mind and capable of making his defence and in this regard the doctor should either clarify his report by a further report or attend Court to give evidence.

[Orders accordingly].

Legislation referred to:
Criminal Procedure Code, ss. 324 (iii), 342(3), 343(i), 344, 346, 349
Penal Code ss. 84, 326

Other sources referred to:
Mallal's Criminal Procedure, 4th Edn., at pp. 511, 513
Mallal's Digest, 4th Edn., Vol. 5, paras 628 to 646

JUDGMENT

Ian H.C. Chin J:

My attention was drawn to this matter by the Senior Federal Counsel by a letter dated 8 October 1993 and I was asked to exercise my power of revision. The history of this case is as follows. On 10 August 1992 the accused Haji Sudin Bin Sube was brought before the Sessions Court to answer a charge of voluntarily causing grevious hurt by a dangerous weapon under s. 326 of the Penal Code. Since there are lessons to be learnt from this case, I will set out the charge that was preferred against the accused, *viz:*

> Bahawa kamu, pada 13 Julai 1992, lebih kurang jam 8.00 malam, di sebuah rumah tidak

> bernombor, di Kampung Muhibbah Raya, di dalam Daerah Tawau, di dalam Negeri Sabah, telah menyebabkan cedera parah kepada dua orang iaitu Sanita Binti Mangkana dan Hatibe Bin Mangkana dengan menggunakan sebilah parang panjang yang mungkin menyebabkan kematian, yang mana senjata tersebut digunakan untuk menetak dan memutuskan tangan dan jari mangsa, dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 326 Kanun Kesiksaan.

It should be obvious to those involved in the administration of justice that the accused had been charged in one charge with two offences which are that he voluntarily caused grevious hurt to Sanita Binti Mangkana and also that he voluntarily caused grevious hurt to Hatibe Bin Mangkana, each of which should have been the subject of a separate charge but both of which could have been tried together. I would recommend the officers concerned to read **Mallal's Diges**t, 4th Edn., Vol. 5, paras 628 to 646, which set out the cases relating to the framing of charges so that errors as that in this case can be avoided. But the learned Senior Federal Counsel is more concerned with the proceedings that took place. On the said day of 10 August 1992 the accused remained silent after the charge was read to him and this led the prosecuting officer to remark that the "accused is mentally disturbed". The Sessions Judge then made the order that the accused "be sent to Mental Hospital for observation for at least a month under s. 324 (iii) of the Criminal Procedure Code"; the section reads:

> If not satisfied that such person is capable of making his defence, such Judge or Magistrate shall postpone the inquiry or trial and shall remand such person for a period not exceeding one month to be detained for observation in any mental hospital wheresoever in the Federation established.

I would pause here to remark that when inquiring under s. 324 of the Code, the Court is not called upon to consider or to find the accused was or was not of unsound mind at the time when the alleged offence was committed. What the Court has to inquire into is the state of mind of the accused at the time when the inquiry is being held under this section. See **Mallal's Criminal Procedure,** 4th Edn., at p. 511. The accused was thereafter sent to the Bukit Padang Hospital in Kota Kinabalu. This case was again mentioned on 8 September 1992 where the Sessions Judge remanded the accused at the said hospital for a further one month as requested by the doctor. It appears from the docket of this case that the Sessions Court had on 1 October 1992 received a medical report dated 23 September 1992 concerning the accused from a Dr. Surendra Kumar Jayaswal of the Bukit Padang Hospital, Kota Kinabalu, which states:

> The above named was admitted to Bukit Padang Hospital, Kota Kinabalu from 12 August 1992 to 23 September 1992 for observation under warrant s. 342(3) of the Criminal Procedure Code.
>
> 2. I, Dr. Surendra Kumar Jayaswal, a psychiatrist attached to Bukit Padang Hospital, examined the above named and I am of the [opinion] that he is suffering from Schizophrenia and is of unsound mind.
> 3. I am also of the opinion that the above named was under influence of mental illness at the time of committing the alleged offence.
> 4. He is fit to plead and attend trial in Court.
> 5. He has been prescribed medication (Tab Haloperidol 5mg OM, 10mg On, Tab Artane 2mg BD, & I/M Modecate 25mg monthly). He has to continue medication and come for follow up treatment for indefinite period to keep the mental illness under control.

The accused was thereafter brought before the Sessions Court on 16 October 1992 and the notes of proceeding of this hearing recorded the following:

> Prosecution: I've referred the matter to Deputy Public Prosecutor who instructed that we should proceed with the charge and leave the matter for the Court to decide.
>
> Court: Based on s. 344 of the Criminal Procedure Code, I shall report the case to the Ruler of the State and the Ruler, may in his discretion, order the accused to be [confined] in mental hospital and the Court shall give effect to such order. Pending the order of the Ruler the accused is committed to mental hospital for safe custody.

The learned Sessions Judge must have had the said medical report in mind at the proceedings even though the notes of proceedings do not say so. The question now is - did the learned Sessions Judge act correctly in resorting to s. 344 of

the Code to commit the accused to the mental hospital for safe custody pending the order of the Ruler of the State when one part of the medical report states the accused is "fit to plead and attend trial in the Court"? For ease of reference s. 344 of the Code is reproduced here:

(i) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Judge or Magistrate, if the offence charged is bailable, may, in his discretion, release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Judge or Majistrate or such officer as the Judge or Majistrate appoints in that behalf.

(ii) If the offence charged is not bailable or if sufficient security is not given the Judge or Magistrate shall report the case to the Yang di-Pertuan Agong in respect of the Federal Territory, the Ruler or the Yang di-Pertua Negeri of the State, as the case may be, in respect of a State in which the trial is held and such the Yang di-Pertuan Agong in respect of the Federal Territory, the Ruler or the Yang di-Pertua Negeri of the State, as the case may be, in respect of a State may, in his discretion, order the accused to be confined in a mental hospital, and the Judge or Magistrate shall give effect to such order.

(iii) Pending the order the Yang di-Pertuan Agong in respect of the Federal Territory, the Ruler or the Yang di-Pertua Negeri of the State, as the case may be, in respect of a State the accused may be committed to a mental hospital for safe custody.

It is only when the accused was, on the day of the hearing on 16 October 1992, of unsound mind and incapable of making his defence that s. 344 can be resorted to. The medical report says the accused "is fit to plead and attend trial in Court" but the doctor appears to contradict himself when he also said in the report that the accused "is suffering from Schizophrenia and is of unsound mind". This makes me ask how the accused can be considered fit to plead and attend Court when he is of unsound mind. Section 343 (i) of the Code requires a certification that the accused "is of sound mind and capable of making his defence" before the trial can proceed. As was said earlier, we are only concerned at this stage of the proceedings to establish whether the accused is or is not of sound mind and capable of making his defence. The medical report went much further, or rather went further back, when it also states that the accused was at the time of the commission of the offence "under influence of mental illness". What **Mallal**, *supra*, says, at p. 511, is relevant, *viz*:

> The procedure in the case of lunacy at the time of the trial and lunacy at the time of the commission of the offence are entirely separate matters leading to different consequences and these two matters must not be confused together.

The crucial issue here is whether the accused "is of sound mind and capable of making his defence" in this case. This involves deciding, quoting from **Mallal** again at p. 513:

> whether the accused is "fit to plead" which is interpreted (by Alderson B), in *R. v. Pritchard*. 7 C.&P. 303, as meaning whether he is of sufficient intellect to comprehend the course of the trial so as to make a proper defence....If you think there is no certain method of communicating the details of the trial to the prisoner so that he can clearly understand them and be able properly to make his defence to the charge you ought to find that he is not of sane mind.

Did the said medical report then satisfy the learned Sessions Judge that the accused was "of unsound mind and incapable of making his defence" ? The learned Sessions Judge did not say so and the medical report, given what I have said, is equivocal. Given the circumstances, the doctor should at least, if not call to give evidence, clarify his report. He should say whether the accused at the present time is of sound mind and capable of making his defence, the test for which I have already elaborated. He should explain why he stated in his report that the accused "is of unsound mind" and then two sentences afterwards stated that the accused "is fit to plead and attend trial in the Court". Therefore, the learned Sessions Judge should not have ordered the accused to be committed to the mental hospital for safe custody pending the "order of the Ruler" (incidentally, it should be the order of the Yang di-Pertua Negeri of Sabah). I therefore set aside the order. I also order that the accused be brought forth before the Sessions Judge to enable him to decide whether the accused is or is not of sound mind and capable of making his defence and proceed thereafter under the appropriate provisions of the Code. In this regard, the doctor should either clarify his report by a further report or attend Court to give evidence. It must be emphasised that even if a person is confined to a mental hospital under the provisions of s. 344 of the Code, the matter does

not end there as s. 349 of the Code may later come into play if the person is later reported to be able to make his defence. In the event of the trial proceeding on account of a finding that the a person is of sound mind and capable of making his defence, the Court will still have to consider, in this case in view of the medical report, whether the commission of the offence was the act of a person of unsound mind because s. 84 of the Penal Code says:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law.

Even if a person can successfully avail himself of s. 84 of the Penal Code, the Court must nevertheless, as required by s. 346 of the Code, when acquitting the person, make a finding whether the person committed the act or not.

PUBLIC PROSECUTOR

v.

SIA PUNG KOK & 2 ORS.

HIGH COURT, SIBU
TUAN HAJI MUHAMMAD KAMIL BIN AWANG JC
[CRIMINAL APPEAL NO. 43 OF 1992]
11 OCTOBER 1993

CRIMINAL LAW & PROCEDURE: Charge of knowingly conveying uncustomed goods - Burden of proof in customs cases - Whether prosecution entitled to rely on presumption under s. 119, Customs Act 1967 - Whether goods were in fact uncustomed - Appeal against decision of Magistrate - Whether appellate Court entitled to interfere with finding of fact by Magistrate.

The accused were charged with knowingly conveying uncustomed goods, an offence under s. 135(1)(e) of the Customs Act 1967 (the Act), after customs officers acting on information received had seized the goods and the lorry on which they were being conveyed. The trial Court found as a fact that duty had been paid on the goods and ordered the acquittal and discharge and the return of the goods and lorry to the accused.

On appeal by the prosecution, it was contended that the Magistrate erred in law and in fact in not holding that the goods were uncustomed and contended further that the burden was on the respondents to prove to the contrary under s. 119 of the Act.

On the other hand, it was contended by the respondents that before considering the presumption created by s. 119 of the Act, the prosecution has to show that the goods in question are uncustomed goods and that they are subject to customs duties.

Held:

[1] In customs cases the burden of proof that the goods are dutiable, uncustomed or prohibited is on the prosecution. In appropriate cases the prosecution may rely on s. 119 of the Act that the goods shall be deemed to be dutiable, uncustomed or prohibited to the knowledge of the accused. The effect of s. 119 is that when a customs officer suspects any goods to be uncustomed goods he is entitled to seize the goods. The respondents contention to the contrary is not consistent with the preponderance of authorities.